THE SASKATCHEWAN HUMAN RIGHTS COMMISSION

Drug & Alcohol Testing – A General Guide

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1. Introduction

Drug and alcohol impairment in the workplace is a genuine concern for many employers. This document contains information about drug and alcohol testing as it relates to human rights law in Saskatchewan. This information does not replace a legal opinion. Employers should consult a lawyer to determine if a policy they have, or one they wish to implement, is discriminatory.

The issue of testing employees and job applicants to find out if they have used drugs or alcohol is controversial. While the objective of preventing employees from using or being under the influence of drugs or alcohol in the workplace is not discriminatory, the means adopted to achieve this objective may result in discrimination against some employees. The information contained in this guide is designed to help employers and employees understand the human rights implications of compulsory drug and alcohol testing.

2. The Relationship: Human Rights Law and Dependence

The Saskatchewan Human Right Code (the *Code*) prohibits discrimination in employment based on 14 different grounds. One of the grounds is **disability**. Drug and alcohol dependencies (often referred to as addictions) are considered disabilities in human rights law. An employee with a drug or alcohol dependence is entitled to the same human rights protections as employees with other types of disabilities.

An employer is also prohibited from discriminating against an employee or a job applicant on the basis of a perceived disability. The law regarding perceived alcohol and drug dependence is unsettled (see section 5).

3. Accommodation and Undue Hardship

When an employee has a drug or alcohol dependence, the employer must accommodate that employee up to the point of undue hardship**.**

Accommodation is the process of making changes or adjustments that eliminate barriers to equal participation and enjoyment of opportunities in employment.

Accommodation is an individualized process and will be different for each employee. Employers, employees, and unions (if the workplace is unionized) all have roles to play and must work together to develop a suitable accommodation plan. The search for accommodation is a multi-party inquiry[1].

The Supreme Court of Canada has interpreted the **undue hardship test** to mean some hardship is to be expected by an employer in the accommodation process[2]. Employers who fail to make efforts to accommodate their employees risk being found liable for a human rights violation. If an employer can

[1] *Central Okanogan School District No. 23 v. Renaud* 1992 CanLII 81 (S.C.C.)
[2] See footnote 1.

demonstrate, however, that it has made significant efforts to accommodate an employee but the employee remains unable to perform the fundamental aspects of his or her job, the employer may be able to establish undue hardship[3].

(a) Factors to consider in undue hardship

Some factors the courts have considered to determine what constitutes undue hardship or burden include:

- A threat to health or safety,
- Major economic impact,
- Past efforts to accommodate the employee in question,
- Disruption to a collective bargaining agreement,
- Diminished morale,
- Lack of an interchangeable workforce, and
- Type of facilities and size of workplace[4].

(b) Examples – accommodating dependence

Some examples of accommodation for drug and/or alcohol dependence may include where an employer:

- Grants a reasonable leave of absence to allow an employee to attend a rehabilitation treatment centre,
- Places the individual in a less safety-sensitive position,
- Modifies the employee's responsibilities for job tasks upon which the person's dependence would negatively impact, and
- Modifies schedules to let the employee take part in a recovery program or allow for continued treatment[5].

(c) Employees' responsibilities

Generally accommodation follows an employee's request for help[6]. Because denial is a symptom of drug or alcohol dependence, it may be difficult to identify the disability. Employers and unions should carefully consider whether unacceptable work behaviour may be due to dependence. An employee's refusal to admit dependence may stop an employer from engaging in an accommodation process in some circumstances[7]. An employer can only assist an employee who is actively involved in the process. If the employee does not participate in a meaningful way, the employer may show that its accommodation obligation was not activated, or alternatively that it met its obligation.

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[3] *Hydro-Québec v. Syndicat des employes de techniques professionelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* 2008 SCC 43 (CanLII)
[4] This list is demonstrative, not exhaustive.
[5] This list is demonstrative, not exhaustive.
[6] *Benoit v. Bell Canada*, 2004 CHRT 32 (CanLII)
[7] Matters must be determined on a case-by-case basis.

(d) Dismissal of an employee

In order to justify dismissal of an employee with a dependence disability, an employer must establish:

- that it has made significant efforts to accommodate the employee and further efforts would create an undue hardship **or**
- that health and safety concerns are so serious that it would be an undue hardship to require the employer to provide accommodation to the worker.

Policies with zero tolerance (automatic dismissal) for a positive result on a drug or alcohol test are likely not allowed. They will only be allowed where the employer proves that a zero tolerance policy is a *bona fide occupational requirement* (BFOR) (see section 6).

4. Difference Between Drug and Alcohol Testing

Many employers do not realize the legal implications of the differences between drug and alcohol tests. **Alcohol testing** by breathalyzer accurately measures present alcohol impairment and is minimally intrusive. **Drug testing**, however, does not test present impairment and is not minimally intrusive. Current-day drug tests can only identify drugs present in the body and cannot measure actual, present impairment. Drugs can remain present in the body long after their effects have worn off. A minimally intrusive drug test that detects present impairment may come into use in the future and change the legal landscape with respect to drug testing.

5. Considerations for Testing

Each employment situation is unique. The Commission *cannot* provide individualized advice to employers about when or whether they can require an employee to take a drug or alcohol test. The Commission *can* provide general guidelines for employers about drug and alcohol testing.

(a) General rules on testing

Testing is generally permissible where:

- The position is safety-sensitive,
- There is reasonable cause to believe that an accident was the result of an employee being under the influence of drugs or alcohol (note that broad mandatory post-incident testing policies will likely be impermissible), **or**
- Testing is part of a return-to-work program which also recognizes that relapse is common and a part of the dependence disability.

Note – Employers have a duty to explore accommodation measures when a dependent employee tests positive.

(b) Random testing

Random **alcohol** testing in a safety-sensitive workplace is likely permissible since alcohol testing detects present impairment.

Random **drug** testing is generally unacceptable in a safety-sensitive workplace because drug tests do not indicate actual, present impairment. Random drug testing may be acceptable in a safety-sensitive workplace as part of a rehabilitative program of monitoring and support. Prior to testing, employers should clearly define the role that random testing plays in the accommodation process.

(c) Other considerations

Broad mandatory testing policies of any kind are generally unacceptable, so testing should be considered on a case-by-case basis. For example, testing may be permissible at a safety-sensitive work-site, but may not be for employees at a site that is not safety-sensitive. Testing in a non-safety-sensitive workplace is generally not necessary and will rarely meet the *bona fide occupational requirement* (BFOR) test (see section 6 below).

The inability of drug tests to show present impairment has resulted in conflicting case law with respect to perceived disability. Casual users who are terminated or not hired because of a failed drug test may have a human rights complaint based on perceived disability depending on the situation.

The Alberta Court of Appeal[8] rejected the perceived disability complaint of a casual user. That court found that a pre-employment drug testing policy that automatically rescinded the casual user's job offer if the employee tested positive did not constitute discrimination based on the employer's perception that the employee was dependant on drugs. Rather, the Court of Appeal found the policy "… perceives that persons who use drugs at all are a safety risk in an already dangerous workplace".

An earlier Ontario Court of Appeal decision[9] held that random urinalysis drug testing at a safety-sensitive workplace was unjustified because:

- it provided no measure of on-the-job impairment,
- it was only evidence of past drug use, and
- it treated casual users as addicts.

Saskatchewan courts have not ruled on whether refusing to hire an individual who fails a drug test is discriminatory.

6. *Bona Fide O*ccupational Requirement (BFOR)

The *Code* prohibits discrimination from the application of an employment policy, practice or standard unless it can be shown that the policy, practice, or standard is an actual job requirement or "***bona fide occupational requirement***" (BFOR). The BFOR test was established by the Supreme Court of Canada in a case

[8] in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company,* 2007 ABCA 426 (CanLII)
[9] *Entrop v. Imperial Oil Ltd.* 2000 CanLII 16800 (On. Ca.)

referred to as *Meiorin*[10]. A workplace drug or alcohol testing policy that would otherwise be discriminatory may be acceptable if it is a BFOR. To show that a drug and alcohol testing policy is a BFOR, an employer must prove:

- The testing achieves a purpose rationally connected to the work and the employer is acting in good faith to achieve that purpose,
- The policy is reasonably necessary in that it:
    - achieves the stated purpose,
    - uses the least invasive approach, and
    - accommodates individual employees up to the point of undue hardship.

(a) Application of the BFOR test to the drug and alcohol testing context:
A testing policy that is part of an overall program which includes medical assessment, monitoring and support is more likely to be acceptable than one that is not.

(i) Proving good faith and rational connection

Good faith - the employer must show that testing is required because of a sincere belief that it is necessary to meet a known business purpose.

The employer will likely establish good faith where that employer:

- conscientiously considers the necessity of testing and its impact on employees, and
- consults with employees and experts on how best to address drug and alcohol use in the workplace.

Rational connection (to the work) - the employer must prove that the testing policy is required for a purpose. For example, testing in a safety-sensitive workplace will likely meet the BFOR test.

Broad mandatory policies, often called 'blanket policies' are not acceptable in most workplaces. For example, it may appear to make sense to test employees at a construction company because of the safety-sensitive environment. However, applying the same policy to all workers – construction crew, ground crew, supervisors, and administrative assistants, will likely not meet the rational connection test. Each of these positions has different job responsibilities, some of which may not be safety-sensitive.

(ii) Proving a policy is "reasonably necessary"

The facts of each situation determine whether a policy is reasonably necessary. An important consideration is the rational business purpose behind the testing policy.

[10] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* 1999 CanLII 652 (S.C.C.)

Some factors to consider when determining whether or not a policy is reasonably necessary include:

- Can the purpose be met through enhanced supervision?
- Is there something about the job site or employment that means performance or safety concerns cannot be addressed as they occur?
- What substances are being tested for? Do other substances or circumstances also pose risks to the workplace? If yes, are those issues also addressed by the workplace safety plan?
- Who is subject to the tests?
- What measures were taken by the employer to ensure testing is the least intrusive means of achieving the identified purpose?

7. Self-disclosure

If a position is safety-sensitive and the employer can establish that testing is a BFOR (clearly connected to ensuring safety in the workplace), questions about past and present drug or alcohol dependence may be justified. Employers should seek legal advice prior to taking negative job action against an employee who discloses drug or alcohol use because such action could be discriminatory. Employers must always consider whether accommodating the employee is possible. Each situation must be individually assessed. Failure to disclose a drug or alcohol problem should also be examined with care because denial may be part of the disability of drug or alcohol dependence.

Employees in non-safety-sensitive jobs should not be required to disclose past drug or alcohol dependence, unless the employer can establish the disclosure is a BFOR.

An employee who asks for help because of drug or alcohol dependence should not be disciplined for doing so. Since the employer's goal is to promote safety in the workplace, the employee's self-disclosure is harmonious with that goal. Employers should have an overall program of medical assessment, monitoring and support to be most effective in reducing safety risks related to workplace impairment.

8. Alternatives to Drug and Alcohol Testing

The Commission encourages employers to adopt programs and policies that identify and respond to all forms of workplace impairment including: impaired function related to stress, anxiety, fatigue and personal problems. Some examples of alternatives to drug and alcohol testing include: employee assistance programs (EAP) which encourage self disclosure and provide support for recovery; workplace health and wellness programs; performance tests for safety sensitive positions; supervisor reviews; and colleague observations.

9. When Employers Decide to Test

Considerations for developing a workplace testing policy:

- **Notify employees of testing.** Employees and applicants should be informed that the workplace conducts tests, what the workplace tests for, and when testing may occur.
- **Handle test samples properly.** Qualified professionals should perform drug and alcohol testing. Results should be analyzed in a legitimate laboratory by a trained individual. Samples should be properly labeled and protected at all times.
- **Keep health records confidential.** Health information must be handled in compliance with the *Health Information Protection Act*.
- **Review results with the employee.** Procedures should be in place to review the results with the employee concerned.
- **Limit scope of testing.** Testing should not be used to reveal anything other than drug and/or alcohol use or dependence. (i.e.) tests should not be used to reveal other medical conditions since the tests in question are for drugs and alcohol only. If the employer tests for anything else, that testing must also be a BFOR.

10. Conclusion

This information does not take the place of a legal opinion. Employers should seek legal advice before making decisions about drug or alcohol testing in the workplace. Due to the complex nature of this topic area and the current lack of clarity in the law, random or pre-employment drug or alcohol testing may result in a complaint to the Commission. Where an employer carefully considers the actual job requirements (BFOR) of each position and the duty to accommodate, that employer will be in a good position to establish that it has properly balanced workplace safety with employee rights to a non-discriminatory workplace.